No. 3967

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

NAMPA & MERIDIAN IRRIGATION DISTRICT,
Appellant,

vs.

J. B. BOND, Project Manager of Boise Project of the United States Reclamation Service,
Defendant,

PAYETTE-BOISE WATER USERS' ASSOCIATION, Ltd., Intervenor,
Appellees.

BRIEF OF APPELLEE, J. B. BOND, PROJECT MANAGER.

HUGH E. McELROY,
Solicitor for Appellant.

E. G. DAVIS and

B. E. STOUTEMYER,
Solicitors for Appellee, J. B. Bond, Project Manager Boise Project, U. S. Reclamation Service.

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Solicitors for Appellee, Payette-Boise Water Users' Association, Ltd.

CAPITAL NEWS PUBLISHING CO., BOISE.

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1. The Complainant alleges the making of a certain contract dated June 1, 1915, between the United States and the Nampa & Meridian Irrigation District, a copy of which is attached to the Complaint as Exhibit 'A". Section 12 of the contract is question provides, among other things:

> "The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the

Interior for similar lands for the Boise Project and the same shall be collected by the District for the United States and paid over by the District to the United States, and upon notice from the officer of the United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge."

2. The Bill of Complaint further alleges that on February 15, 1921, the Secretary of the Interior issued a Public Notice assessing a special operation and maintenance charge for drainage purposes against all the project lands of the Boise Project, including the 40,000 acres in the Nampa & Meridian Irrigation District. A copy of the Public Notice in question is attached to the Complaint as Exhibit "C", and is in words and figures as follows:

" PUBLIC NOTICE (No. 6)

BOISE PROJECT, IDAHO-OREGON

Department of the Interior,
Washington, D. C., February 15, 1921.

1. ANNUAL OPERATION AND MAINTENANCE CHARGE FOR DRAINAGE.—In pursuance of Section 4 of the National Reclamation Act of June 17, 1902 (32 Stat. 388) and of Acts amendatory thereof, or supplementary thereto, particularly the Extension Act of August 13, 1914, (38 Stat. 686) an-

nouncement is hereby made that the annual operation and maintenance charge for the irrigation season 1921 and until further notice against all lands of the Boise Project under Public Notice (except the One Thousand Eight Hundred (1,800) acres, more or less in the State of Oregon) shall be divided into two parts:

(a) A regular operation and maintenance charge to be hereafter announced in the usual manner to cover all costs of operation and maintenance other than drainage.

(b) A special operation and maintenance charge for drainage purposes of One Dollar ($1.00) per irrigable acre per year until further notice, to become due and payable Fifty (50c) cents per irrigable acre on April 1, 1921, and Fifty (50c) cents per irrigable acre on October 1, 1921, and Fifty (50c) cents per irrigable acre on March 1st and October 1st of each year thereafter until further notice, the money received from such special operation and maintenance charge to be used after the same has been paid in to the United States, in providing drainage on the Boise Project to minimize or prevent as far as possible the swamping and water-logging of the lower lying lands of the project by seepage from the irrigation of the higher lands and by seepage from the irrigation system of the project, to lessen the damage which would otherwise result from the operation of said canal system and to maintain the irrigability of the lands of the project, said drainage charge to be considered a part of the minimum operation and maintenance charge per irrigable acre, the remainder of said minimum charge per acre and all charges per acre-foot of water used in ex-

cess of the amounts of water allowed for such minimum charge to be hereafter announced and determined by Public Notice to be hereafter issued from time to time.

JOHN BARTON PAYNE,
Secretary of the Interior."

(Pages 44 and 45 of Transcript).

3. The Complaint further sets out that the Secretary of the Interior has made investigations for and authorized the construction of a drainage system on the Boise Project outside of the Nampa & Meridian Irrigation District for the drainage of lands located in what is known as the Golden Gate, Wilder, Arena and Deer Flat sections in the lower half of the project where several thousand acres of land are in immediate danger from the ground water which is now within five (5) feet of the surface and steadily rising.

4. The Complainant alleges in paragraphs 10 an d11 of the Bill of Complaint (pages 10 and 11 of the transcript):

"10. That as a result of irrigation from the said irrigation system of the Boise Project the water table is rapidly rising under portions of the Boise Project outside of the Nampa & Meridian District, particularly in the Golden Gate, Wilder, Arena and Deer Flat sections in the lower half of the project, and that in the opinion of the officials of the United States Reclamation Service it has become necessary to construct a drainage system in said portions

of the project in order to prevent the lands thereof from being ruined by seepage and alkali. That the Secretary of the Interior has caused to be made surveys and investigations of a proposed drainage system for said lands and has caused investigations to be made of the seepage and ground water conditions under said portions of the project, from which it appears that several thousand acres of land in said sections are in immediate danger from the ground water table which is now within five (5) feet of the surface and steadily rising, and that if drainage is not provided, said lands will suffer irreparable injury from seepage and water-logging."

"That the Secretary of the Interior has approved the said proposed drainage system and has authorized the construction thereof as a part of the operation and maintenance work of the Boise Project with funds to be collected for that purpose from the water users as an operation and maintenance charge."

"11. That for the purpose of providing the necessary funds for the construction of said drainage system as aforesaid the Secretary of the Interior on February 15, 1921, issued a public notice, copy of which is hereto attached and made a part hereof, and marked Exhibit 'C'."

5. The Complainant alleges that the funds to be collected under the Public Notice quoted above are to be used in the construction of said proposed drainage system in the Golden Gate, Wilder, Arena and Deer Flat sections of the project outside of the Nampa & Meridian Irrigation District, that the

assessment levied by the Secretary of the Interior for the purpose of providing such drainage system is not a lawful or proper operation and maintenance charge, and that as a matter of law the Secretary of the Interior is without authority to levy such charge against the 40,000 acres of project lands in the Nampa & Meridian Irrigation District as an operation and maintenance charge.

6. The Complainant further alleges that the Complainant, Nampa & Meridian Irrigation District, has refused to pay this charge and that the Defendant, J. B. Bond, the Project Manager of the Boise Project, has threatened and unless restrained by an order of this Court will refuse to deliver water to the said project lands in the District on account of the refusal of the District to pay the said operation and maintenance charge for drainage purposes.

7. The Complainant asks relief of the Court in the form of a mandatory injunction to require the Project Manager to continue the delivery of water to the project lands in the District notwithstanding the failure and refusal of the District and the project landowners of the District to pay the said operation and maintenance charge for drainage purposes.

8. The Complainant has attached to the Complaint, in addition to the two contracts between the

United States and the District, the Public Notice of February 15, 1921, and copy of the Decree in the case of Payette-Boise Water Users' Association v. J. B. Bond, together with the Stipulation, Contract and other papers attached to that Decree.

9. The Defendant filed a motion to dismiss on the ground that the Bill of Complaint fails to state any cause of action in equity, or any ground for equitable relief. The motion to dismiss was sustained by the District Court and a Decree of Dismissal entered from which the Complainant has appealed to this Court.

10. This record presents two questions:

1st. Is it within the power and discretion of the Secretary of the Interior, under the law, to provide necessary drainage in a federal reclamation project, as an operation and maintenance charge, in order to prevent the project from destroying itself in whole or in part by seepage from the irrigated lands, and from the canal system of the project, this being in many cases the only way in which the necessary drainage can be provided?

2nd. If it is thought that in the absence of contract the Secretary would not have such power under the law, and yet this is a question on which reasonable men, even learned judges might differ in their opinions, and the Appellant has agreed to accept the decision of the Secretary of the Interior

by agreeing to pay the same charge for th project lands in the District which the Secretary shall announce for the project lands outside of the District, and the Secretary has decided this question by announcing the charge in question as a part of the operation and maintenance charge for the project lands outside of the District, and in making such decision has acted in good faith and without fraud (no fraud being charged) is not the Appellant bound by its agreement to accept this decision of the Secretary and to pay the same charge applicable to the projct lands outside of the District?

11. We think that both these questions must be answered in the affirmative, but if either of them is answered in the affirmative, the decision of the lower court sustaining the motion to dismiss, is correct.

12. Whatever arguments may be offered by Counsel, the conclusion is unavoidable, that Appellant's demand in this case is a demand for preferential treatment under which, if the Appellant is successful, the project lands in the District would be given a very much lower charge than is required of the project lands outside of the district.

13. This is contrary to the intent of the parties as expressed in the contract (see paragraph 12 of contract, pages 28, 29, 30 and 31 of transcript), and is also contrary to the dictates of good public

policy applicable alike to private irrigation projects, irrigation districts, and government projects.

> "We do not apprehend that rental charges for the use of water from irrigating canals is based upon the actual expenses of carriage and delivery to each consumer. If that were true, the rate charges to the land owner at the upper end of the main canal would be comparatively insignificant, while the rate charged to the man who lives at the extreme end of the canal, fifty or sixty miles from its intake, would be so enormous and exorbitant as to prohibit its use and make agricultural pursuits an impossibility with him. This is not the theory on which water rates are established."
>
> Niday v. Barker, 16 Idaho 73, 101 Pac. 254.
>
> Colburn vs. Wilson, 24 Idaho 104, 132 Pac. 579.

14. In the case of Colburn v. Wilson, reported in the 24 Idaho 104, 132 Pac. 579, the Supreme Court of Idaho said, in regard to the proper distribution of maintenance charges in an irrigation district:

> "In making such assessment it was intended by the legislature that in the annual assessment for maintenance and operation of the water system the lands irrigable under the system within the district should be considered as a whole and such lands must be assessed at the same rates where the benefits—

that is, the water needed and received—are the same."

15. The District Court was in harmony with the Supreme Court of Idaho and with the general doctrine applicable everywhere when it said in this case:

> "But in so reasoning sight is lost of a fundamental characteristic of all irrigation systems constructed under either the state or the federal laws. Such a project is an indivisable unit, the burden of constructing and maintaining which is apportioned ratably to all lands receiving water therefrom. A water user cannot divide a system into its component parts and decline to pay his share of the cost of constructing or maintaining, or of operating, those portions from which he receives no direct benefit. If a wasteway at the lower end of a system, or a drainage ditch, is essential to the lawful and efficient maintenance and operation of the system, it is properly to be regarded as a part of the system and a water user near the head can no more consistently decline to pay his ratable share for its construction and maintenance than he could decline to pay for the lower portion of the main canal, or for laterals that do not serve his lands. When the drainage ditches within the plaintiff district were constructed for the plaintiff lands they were correctly treated a part of the irrigation system, and quite as correctly their cost was distributed ratably to all the the lands without consideration of the question of direct benefit."
>
> (Pages 82 and 83 of transcript).

16. The Appellant argues that by reason of the contract between the Appellant District and the United States the 40,000 acres of project lands within the boundaries of the District has been segregated from the remainder of the project and constitutes in effect a separate project, or separate unit, which cannot be charged any part of the cost of providing necessary drainage in other parts of the project.

17. Appellant's position is especially inequitable under the facts of this case, because, when the Plaintiff lands referred to as the project lands of the District, were themselves in need of drainage, it was successfully argued that these lands were a part of the project and not segregated therefrom as a separate unit or project, and therefor that the cost of draining the project lands of the District should not be charged to such lands alone but to the project as a whole.

18. The District contains 24,557 acres of old water right lands irrigated from the Ridenbaugh and other old canals (page 17 of transcript) (also paragraph 3 of Bill of Complaint, page 7 of transcript), and about 40,000 acres referred to "project lands" and irrigated entirely from the Government irrigation system of the Boise Project (see paragraph 3 of Complaint, pages 7 and 8 of transcript).

19. Paragraph 1 of the contract (page 19 of the transcript) provides:

> "That as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars ($557,000.00)."

And in paragraph 3 of the contract (pages 21 and 22 of the transcript) it is provided:

> "That the District will pay to the United States for that portion of the above described drainage work in the District, equity chargeable to the old water right lands in the District, the sum of Two Hundred Sixty-six Thousand Dollars ($266,000)."
>
> "No portion of said sum of Two Hundred Sixty-six Thousand Dollars ($266,000) shall be apportioned to the project lands in the District but the balance of the said sum to be expended on drainage works in the District as provided in paragraph 1 hereof shall be charged to the general expense of the Boise Project and the project lands in the District shall pay the construction, operation and maintenance charges provided in paragraphs 11 and 12 hereof."

So the difference between $557,000 and $266,000 or $291,000 was the amount to be contributed by the Boise Project as a whole toward the drainage of the 40,000 acres of project lands in the District. On account of the fact that the drainage system in the District was completed at less than the estimater cost, and cost $340,000 instead of $557,000,

as originally estimated, the charge both to the old water right lands of the District and to the Boise Project was reduced in like proportion to One Hundred Sixty-two thousand three hundred sixty-nine and eighty-four/hundredths ($162,369.84) Dollars, and One Hundred Seventy-seven thousand Six Hundred three and sixteen-hundredths ($177,603.-16) Dollars respectively.

(See pages 35 and 36 of transcript).

20. So the lands in the lower half of the Boise Project in what is known as the Deer Flat, Golden Gate and Arena sections of the project which are now in need of drainage, have paid and are still paying a part of the cost of draining the project lands of the District.

21. It appears to be the position of the owners of the project lands in the District that when they need drainage they are a part of the Boise Project, and other parts of the project should help pay for their drainage, but when they have been drained and other parts of the project need drainage, then it is claimed that they are segregated as a separate unit and should pay nothing toward the drainage of other parts of the project.

22. Counsel's suggestion that by reason of the contract between the District and the United States the District lands have been excluded from the project or segregated as a separate unit entitled to

a lower charge is not supported by the language of the contract. Under this contract a different collection agency was provided for collecting the charges from the lands in the District from that employed outside of the District, but it is plain that the lands in the District were not excluded from any of the benefits of the project (see paragraph 11 of contract, page 27 of transcript) and it is equally plain that it was intended that the project lands in the District were to pay the same for the water which they were to receive (see paragraph 12, pages 28, 29, 30 of transcript), and this was particularly true of the expense in connection with or growing out of the operation of the project, for it was agreed, that 'the project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project." One of the results of the operation of the project is the swamping of certain lands by seepage from the project canals and irrigation on the highest lands of the project, and the drainage in question is an expense necessary in order to enable the Secretary of the Interior to continue the opration of the project works for the benebit alike of the lands in the District and out of the District without destroying a large part of the project lands. (See paragraph 10 of Bill of Complaint, pages 10 and 11 of transcript). The very name used inthe contract to des-

ignate the plaintiff lands, namely, "project lands" in the District implies that they are a part of the project and not excluded from it.

23. We find no support for Appelant's assertion on page 4 of its brief that the jurisdiction of the Secretary to make this contract is found in Section 5, Act of Congress of August 13, 1914, known as the Extension Act. The contract itself refers to the Act of Congress of June 17, 1902 (32 Stat. 388) (Reclamation Act), and the Act of Feb. 21, 1911 (36 Stat. L. 925) (Warren Act), as the Acts under which the contract is made. (See page 17 of transcript). It is designated as Draft of July 24, 1914, and appears to have been prepared and submitted before the Act of August 13, 1914 was passed, although signed after the date of that Act.

24. Similar contracts were made in earlier years and some of them have been passed upon by the Courts and held to be within the authority of the Secretary under the provisions of the Reclamation Act.

> Pioneer Irr. Dist. v. Stone, 23 Idaho 344, 130 Pac. 382.
> Hillcrest Irr. Dist. v. Brose, 133 Pac. 662, 24 Idaho 376.

25. With reference to the same contract here involved, the Supreme Court of Idaho said in

Nampa & Meridian Irrigation District v. Petrie, 28 Idaho 227, 163 Pac. 425:

> "That the Secretary of the Interior has the power to enter into a contract to supply water to an irrigation district under the provisions of the Act of Congress of June 17, 1902, known as the Reclamation Act (32 Stat. at L. 388; 7 Fed. Stats .Ann. 1098; U. S. Comp. St. 1913, Secs. 4700-4708), we think there can be no doubt. If there was any doubt of the authority of that official to enter into such contracts, it was clearly removed by the Act of Congress of February 21, 1911, known as the Warren Act (36 Stat. at L. 925, Sec. 2 (U. S. Comp. St. 1913, Sec. 4739), and the subsequent enactment of Congress passed August 13, 1914, known as the Reclamation Extension Act, chapter 247, Sec. 7, 38 Stat. 688)."
>
> Nampa & Meridian Irrigation District v. Petrie, 28 Idaho 227, 163 Pac. 425.

Some additional authority may be found in the Extension Act of 1914, but the decisions are uniform in holding that the Secretary had ample authority under the Reclamation Act and Warren Act before the Extension Act was passed.

26. Neither does the contract support Counsel's assertion that a part of the project works have been turned over to the District under Section 5 of the Extension Act. The United States has employed the District to perform the last step in the distribution of the Government water to that

part of the District lands lying under the Ridenbaugh Canal, but pays the District for this service just as it would any other contractor or employee and collects the same Operation and Maintenance charge from these lands as from the other project lands.

27. But it is not material whether this contract i sconsidered as coming under the Reclamation Act, the Warren Act, or the Extension Act, or under all three of these Acts for there is no more reason under the one Act than the other for giving a lower charge to the project lands of the District than is required of the project lands outside of the District.

28. We will take up in order the two questions necessary to be decided in this cast:

1st. Is it within the power and discreition of the Secretary of the Interior, under the law, to provide necessary drainage in a federal reclamation project, as an operation and maintenance charge in order to prevent the project from destroying itself in whole or in part by seepage from the irrigated lands, and from the canal system of the project, this being in many cases the only way in which the necessary drainage can be provided?

2nd. If it is thought that in the absence of contract the Secretary would not have such power

under the law, and yet this is a question on which reasonable men, even learned judges might differ in their opinions, and the Appellant has agreed to accept the decision of the Secretary of the Interior by agreeing to pay the same charge for the project lands in the District which the Secretary shall announce for the project lands outside of the District, and the Secretary has decided this question by announcing the charge in question as a part of the operation and maintenance charge for the project lands outside of the District, and in making such decision has acted in good faith and without fraud (no fraud being charged) is not the Appellant bound by its agreement to accept this decision of the Secretary and to pay the same charge applicable to the project lands outside of the District?

29. It is evident that the answer to the first of these questions will be very far-reaching in its results affecting not the Boise Project alone, but all Reclamation projects.

30. There are very few extensive irrigation projects on which drainage does not sooner or later become necessary. Where the seepage arises before the public notice is issued, as it did in the Nampa & Meridian District, the cost of the necessary drainage may be provided as a part of the construction cost, but if the seepage condition arises after the public notice has been issued, as will most often be the case, and the construction charge has

been definitely and finally fixed by public notice and cannot be increased to provide for additional drainage, it will generally be true that drainage cannot be provided at all unless it can be provided as an operation and maintenance charge.

31. The Appellant points to Section 4 of the Reclamation Extension Act of August 13, 1914 (38 Stat. 686) which provides:

> "Sec. 4. That no increase in the construction charges shall hereafter be made, after the same have ben fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase, whereupon all water right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto."

and suggests that by an agreement between the Secretary of the Interior and a majority of the project settlers the additional drainage could be provided as an increased construction charge.

32. But if 20 or 25% of the project land is being swamped with water seeping from the irrigation canals and the higher irrigated lands of the project, or any other percentage less than half, as will usually be the case, and the 75 or 80% who do not need drainage are controlled by motives of self interest, as men usually are, it would obviously be impossible for the 20 or 25% who need the drainage to out-vote the 75 or 80% who do not,

and there is also this additional objection—that no additional construction funds will be available for such work even if a majority of the settlers were ready to contract for it, unless Congress appropriates additional Government money for that purpose, and Congress may very well refuse to appropriate additional Government money to make good the damage resulting from the operation of the project, which it would seem should more properly be taken care of by the project itself.

33. Consequently, in many cases if the drainage cannot be provided as an operation and maintenance charge, it cannot be provided at all, which would lead not only to heavy losses to the settlers whose lands are being swamped by seepage from the operation of the project, but also to a diminution of the Reclamation Fund itself,

"A result which Congress did not intend."

Swigart v. Baker, 229 U. S. 187, 57 L. Ed. 1143, for swamped lands which are incapable of producing crops cannot be expected to return construction charges.

34. At the time the contract in question was made neither the state laws applicable to irrigation districts, nor the Federal laws applicable to Federal Reclamation projects, contained any provision expressly authorizing the construction of drains either by irrigation districts or by the Secretary of

the Interior, but in both cases it has been decided that the power exists as incidental to the power to furnish water for irrigation and we think that the decisions of the courts plainly indicate that the power to provide drainage grows out of the duty of the United States, or the District, as a canal owner, to so operate and maintain its canal system that the same will not destroy the property of others, and if this can be accomplished most effectively and economically by providing a system of drains to remove the surplus water brought upon the land by the operation of the irrigation system, then such drainage may be considered as incidental to the operation and maintenance of the irrigation system.

35. The Circuit Court of Appeals for the Eighth Circuit said in the case of United States v. Ide, 277 Fed. 382:

> "It is well settled that the plaintiff may construct drainage works as a part of its irrigation system. Bisset v. Pioneer Irr. Dist., 21 Idaho, 98, 120 Pac. 461; Pioneer Irr. Dist. v. Stone, 23 Idaho, 344, 130 Pac. 382; Nampa & Meridian Dist. v. Petrie, 28 Idaho, 227, 153 Pac. 425; G. G. Burt et al Drainage Dist. v. Farmers' Co-operative Co., 30 Idaho 752, 168 Pac. 1078. The necessity for drainage and the methods of conducting the work are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the courts. Ness v. Fisher, 223 U. S. 691, 32 Sup. Ct. 356, 56 L. Ed. 610; Knight v. U. S. Land Association, 142 U. S.

161, 12 Sup. Ct. 258, 35 L. Ed. 974; Noble v. Union River Logging Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123 (1893); U. S. v. Minidoka & W. R. Co., 190 Fed. 491, 111 C. C. A. 323 (1911); Stalker v. O. S. L. Ry. Co., 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027 (1912); U. S. v. O'Neill (D. C.) 198 Fed. 680; U. S. v. Burley (C. C.) 172 Fed. 617; tSate ex rel. Megler v. Forrest, Commissioner of Public Lands, 13 Wash. 268, 43 Pac. 51, (1895); U. S. v. Doherty (D. C.) 27 Fed. 730; U. S. v. Schurz, 102 U. S. 375, 26 L. Ed. 167; Cosmos Exploration Co. v. Gray Eagle Co., 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064; Riverside Oil Co. v. Hitchcock, 190 U. S. 317, 23 Sup. Ct. 698, 47 L. Ed. 1074; U. S. v. Speed, 8 Wall 77, 83, 19 L. Ed. 449; Earnshay, v. U. S., 146 U. S. 60, 13 Sup. Ct. 14, 36 L. Ed. 887; Bates v. Payne, 194 U. S. 107, 24 Sup. Ct. 595, 48 L. Ed. 894."

United States vs. Ide, 277 Fed. 382.

36. The first case cited by the Circuit Court of Appeals for the Eighth Circuit in support of the statement that, "It is well settled that the plaintiff may construct drainage works as a part of its irrigation system", is the irrigation district case of Bissett v. Pioneer Irrigation District, 21 Idaho 98, 120 Pac. 461, in which the Supreme Court of Idaho said:

> "The law clearly authorizes the formation of irrigation districts and procuring a sufficient supply of water for such purposes. If in the course of performing this work, seepage and percolating waters from the canal system flood and overflow the lowlands of land

owners within the district, the district is certainly under an obligation to take care of such seepage or overflaw and protect such land (Stuart v. Noble Ditch Co., 9 Idaho 755, 76 Pac. 255) and it would seem that the district would have the implied power to take such steps as would be necessary in order to protect landowners from damage or the loss of the ue of their lands."

Bissett v. Pioneer Irr. Dist., 21 Idaho 98, 120 Pac. 461.

37. In the case of Pioneer Irrigation District v. Stone, 23 Idaho 344 (130 Pac. 832), the Supreme Court of Idaho held:

"Under the laws of this state, an irrigation district may provide for the drainage and reclamation of lands within the district which have been flooded or water-logged by reason of overflow percolation, or seepage from its irrigatin works, and the accomplishment of such purpose is one of the necessarily implied duties of the district equally as incumbent on the district as the irrigation of its dry and arid lands."

Pioneer Irr. Dist. v. Stone, 23 Idaho 344, 130 Pac. 382.

And in the same case also decided:

"Upon the question of whether or not in irrigation district has a right to provide means and expend money for the drainage of overflowed lands within the district, this Court, in the case of Bissett v. Pioneer Irrigation

District, 21 Idaho 98, 120 Pac. 461, expressed the opinion that such action might be taken. While the views there expressed were not essential to th determination of that cas, a further investigation of the question convinces us of the correctness of the impressions the Court then had on the subject and we adopt the views therein expressed as the opinion of this Court and hold that an irrigation district posseses the powers necesary to drains it overflowed lands and to protect its landowners from seepage and overflow waters as well as to supply water to the dry and arid lands of the district."

Pioneer Irr. Dist. v. Stone, 130 Pac. 382, 23 Idaho 344.

38. In the case of Burt, et al., Com. Drainage District No. 1 v. Farmers Cooperative Company, et al., 30 Idaho 752, 168 Pac. 1078, the Supreme Court of this state made the following statement in regard to the policy of the state in regard to drainage in connection with irrigation projects:

"It seems in this irrigated country the question of drainage is now confronting almost every irrigated section, and there seem very cogent reasons for a return to the former rule above stated (referring to the common law rule hereafter stated), at least to the extent of assessing lands for the construction of a drainage system from which seepage or percolation damages or injuries other lands. The early settlers of the arid regions were not confronted with the question of drainage, but time and experience have proven that a drainage

system is absolutely necessary where large areas of desert land are reclaimed by irrigation."

"It is a well recognized fact that under many of the irrigation systems of our state thousands of acres of land which were reclaimed from an arid condition and which for a time produced valuable crops have now become alkalined or water-logged and thus ruined, and grow nothing but willows and tules because of the seepage of waters from canals and the irrigation of higher lands. And it certainly is not the public policy of the state to permit thousands ,if not hundreds of thousands of acres of lands that were once productive to be ruined and made worthless, and leave the owners thereof remediless."

Burt, et al., com. Drainage Dist. No. 1 v. Farmers Coop. Co., et al., 30 Idaho 752, 168 Pac. 1078.

In the same case the Court stated the principle involved under the Drainage District Laws of this state as applied to irrigation projects, in the following language:

"The law permitting high lands irrigated by artificial means which are responsible in part for the swampy condition of lower lands to be assessed for a portion of the cost of constructing the drainage works is an exercise of that power whereby the legislature provides the means and methods by which one may so use his own property as not to injure that of another."

Burt, et al., Com. Drainage Dist. No. 1 v. Farmers' Coop. Irr. Co., et al., 30 Idaho 752, 168 Pac. 1078.

39. From these cases it would appear to be the opinion of the Supreme Court of this state that drainage on an irrigation project, especially where the water-logged condition is due in part to the seepage from the irrigation system, is incidental to the operation and maintenance of the canal system and is a means by which the owners and beneficiaries of the canal system may enjoy the advantages of irrigation from that system without doing damage to others.

40. In the case now before the Court the project lands of the Nampa & Meridian Irrigation District are the equitable owners or beneficiaries of a four-fourteenths interest in the irrigation system of the Boise Project by means of which their lands are made productive and valuable. It would seem to us that there is no injustice in requiring as a condition to the enjoyment of this benefit, that they contribute to such measures as are necessary to prevent the operation of this system from becoming the means of dstroying the property of other landowners, and this appears to be especially equitable in the case of the project landowners in the Nampa & Meridian Irrigation District in view of the fact that their lands have already been drained at the expense of the project as a whole.

41. Since it is evident that in many cases at least drainage cannot be provided at all unless it can be provided as an operation and maintenance charge, all the reasons which lead to the conclusion that drainage may be provided under the Reclamation Act apply with equal force to sustain the argument that drainage may be provided as an operation and maintenance charge.

42. In Section 5 of the Reclamation Act it is provided that the entryman must, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes. It is evident that Congress intended that the land should be reclaimed, and we submit, that to convert and an arid waste into a useless swamp and leave it in a condition as worthless as it was in the beginning, would not be reclamation. Reclamation is a broader term than irrigation. In fact, in California, where most of our irrigation law originated, "Reclamation Districts" for drainage purposes preceded irrigation districts and when the question of the constitutionality of the irrigation district law was raised the decisions in regard to such Reclamation Districts for drainage purposes were cited in support of similar powers for irrigation purposes.

Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369.

43. The term "Reclamation" has always been understood as implying drainage as much as irrigation. Kinney in his work on irrigation discusses the question of drainage in conection with irrigation as follows:

> "The drainage of irrigated lands, and lands which lie below where irrigation operations are being carried on, has become almost as great a question from an economic standpoint, in many localities, as is the application of the water to the lands for irrigation. In the early history of irrigation, the lands adjoining the streams were first taken up and upon these irrigation operations were first commenced. These lands lying close to the natural streams required but little artificial drainage. But as time has gone on, the lands higher up and farther back from the stream were taken up and also irrigated. After this, it was found that the first farms were becoming too wet, caused by the seepage from the irrigation above them. This process has been repeated; and as still higher lands were irrigated, in many instances, the first farms upon the lower lands have become practically swamps. It therefore naturally follows that, in order to develop these sections of the country to their full capacity, and not to retard their progress where they have been once developed, th question of the drainage of these lands has become one of great aconomic importanc. In fact, the two questions of irrigation and drainage must go hand in hand where this condition exists."
>
> Kinney on Irrigation and Water Rights (2nd Ed.) par. 38, page 57.

44. Part of the water used for irrigation is used up in evaporation from the land and plant growth ,but a part seeps or percolates down into the subsoil and if the natural drainage is insufficient to carry off this percolating water, the land will inevitably be swamped in a few years and become worthless and unproductive unless a system of drainage is constructed in connection with the irrigation system to take off the surplus water placed on the land through irrigation.

45. The Supreme Court has declared that it was the intention of Congress that the Secretary of the Interior should collect the Government money invested under the Reclamation Act, without diminution.

Swigart v. Baker, 229 U. S. 187, 57 L. Ed. 1143.

But if the land is allowed to become seeped and worthless and the Secretary of the Interior is not permitted to mploy the necessary means to prevent or remdy this condition, the security for the Government's investment would be lost and how could the secretary collect the money invested? To allow the land to become swampd and unproductive would defeat the entire purpose of the Reclamation Act. The expected reclamation of arid land, the increase in food production, the building of more homes on the land, and the increased prosperity

and well-being of the whole country ,which was expected to result from such reclamation, would not be accomplished and the money invested by the Government could not be collected from worthless and unproductive land.

46. Since Congress has imposed on the Secretary of the Interior the duty to accomplish two purposes, the reclamation of arid land, and the recovery of the money invested, it would be most unreasonable to suppose that Congress intended to deny him the right to use the best and in many cases the only means by which the required objects can be accomplished.

47. The Appellant makes its argument for exemption from contribution to the cost of providing drainage in other parts of the project by offering a very strict construction of the term "maintenance" thus

> "In 'Words and Phrases' under head of 'maintain' we find:
>
> " 'The word "maintain" has been defined as meaning to support that which has already been brought into existence. Kendrick and Roberts vs. Warren Bros. Company, 72 Atl. 461, 464;'
>
> " 'Maintain' is defined to mean, to hold or keep in a particular state or condition, especially in a state of efficiency.' Kovachoff vs. St. Johns Lumber Company (Ore.) 121 Pac. 801, 803.' "

and then jumping to the conclusion contrary to the language of the statute that it is not the project as a whole, but only the irrigation works which we are to "support", "sustain", and "not suffer to decline". Many courts give the term "maintenance" a broader meaning as will be shown in the cases cited later in this brief, but if we assume that it means only upkeep and forget for the time being the companion term "operation", and the fact that the drainage here involved is necessary to remedy the damage which is admittedly the result of the operation of the project works, still counsel flies in the face of the language of the statute when he jumps to the conclusion that it is only the upkeep of the irrigation or drainage system itself which may be considered in determining the operation and maintenance charge and not the upkeep of the project as a whole, for the statut (Sec. 5, Act of Congress Aug. 13, 1914, 38 Stat. 686) provides:

> "Section 5. That in addition to the construction charge, every water right applicant, entryman or landowner, under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the *project*."

The term "project" is a broader term than the term "irrigation system" or "drainage system" and includes the irrigable lands as well as the irriga-

tion works, so if the term "maintenance" is considered as synonymous with "upkeep", as counsel asserts, it is the upkeep of the project which is to be considered and for which the maintenance charge is to be levied.

48. Now with this provision of the statute in mind let us consider whether the proposed drainage system is, or is not, necessary for the upkeep of the project and the project lands. On this point the Bill of Complaint sets out in paragraph 10 as follows:

> "10. That as a result of irrigation from the said irrigation system of the Boise Project the water table is rapidly rising under portions of the Boise Project outside of the Nampa & Meridian Irrigation District, particularly in the Golden Gate, Wilder, Arena and Deer Flat sections in the lower half of the project, and that in the opinion of the officials of the United States Reclamation Service it has become necessary to construct a drainage system in said portions of the project in order to prevent the lands thereof from being ruined by seepage and alkali. That the Secretary of the Interior has caused to be made surveys and investigations of a proposed drainage system for said lands and has caused investigations to be made of the seepage and ground water conditions under said portions of the project, from which it appears that several thousand acres of land in said sections are in immediate danger from the ground water table which is now within five (5) feet of the surface and steadily rising, and that if drainage is not provided,

> said lands will suffer irreparable injury from seepage and water-logging."

Surely when Complainant alleges:

> "that several thousand acres of land in said sections are in immediate danger from the ground water table which is now within five (5) feet of the surface and steadily rising, and that if drainage is not provided, said lands will suffer irreparable injury from seepage and water-logging,"

counsel cannot claim that the project will be kept up, or will remain in the same statu quo without this drainage.

49. Counsel for the District has called the Court's attention to the fact that the Reclamation Extension Act was passed prior to the signing of the contract between the United States and the District. This being the case, the District must be presumed to have known that under the statute the operation and maintenance charge which the Secretary would announce and which the District agreed to pay, was to be an operation and maintenance charge for the maintenance of the project, including the irrigable lands and not merely the operation and maintenance of the irrigation works, for such is the language of the statute. That the term "project" as used in connection with the Federal Reclamation Laws includes the lands as well as the works is shown by numerous statements of the courts in practically all of the cases referring to

the Reclamation Act. For instance, in the recent opinion by Chief Justice Taft in the case of Irvin v. Webb, 66 L. Ed. 333 (advance sheets), it is said:

> "He averred that he had an interest as a homestead entryman under the general Homestead Act of Congress of May 20, 1862, and the Reclamation Act of June 17, 1902, in land included within the Salt River Reclamation Project."

Again on page 337 of the same case, the Court said:

> "The secretary is authorized to fix a limit of area of land per entry representing the acreage which may reasonably support a family. The secretary is given full power in paragraph 10 to make rules and regulations needed to carry the act into effect. He has done so, under the act and regulations contained in the General Reclamation Circular each entryman is required to conform his entry to a farm unit established by the secretary within each Reclamation project."

Again in the recent decision of this Court in the case of Yuma County Water Users' Association v. Schlecht, reported in the 275 Fed. 889, the Court says:

> "The public notice and the letters of the Secretary of the Interior to the association are based upon his determination that the project was completed. His determination was based upon investigation into facts and found support in the opinion of an experienced engineer

and we think that in withdrawing... certain lands and confining the project to the area described in the public notice the secretary exercised discretion and power vested in him under the law."

Yuma County Water Users' Association v. Schlecht, 275 Fed. 889.

50. There is no lack of authority for holding that the term "maintenance" may include certain items of construction, or at least of improvement.

"*Creation of road system.*—Const. art. 8, Sec. 9, providing that the Legislature may pass local laws for the 'maintenance' of public roads without the local notice ordinarily required for special laws, is applicable to the Shelby county special road law, which provides for the creation as well as maintenance of a road system. Ex parte Cooks (Tex.) 135 S. W. 139, 141."

"*As erection.*—The word "maintain' ordinarily means to preserve something which is already in existence; but, considering that, by the use of the words 'unless one of them chooses to let his land lie without fencing,' Civ. Code, Sec. 1301, declaring that coterminous owners are mutually bound equally to maintain the boundaries and monuments between them and the fences between thm, unlss one of them chooses to let his land lie without fencing, applies to land not fenced, it is comprehensive enough, in the light of the subject-matter, to include the erection, as well as the maintenance, of the fences. Hoar v. Hennessy, 74 Pac. 452, 454, 455, 29 Mont. 253."

"*As improve.*—In Act June 24, 1895, authorizing the organization of park districts, and providing (section 1) that no portion of such park district should be already included in a park district or in a township whose corporate authorities are authorized by law to levy special taxes or special assessments to maintain a public park, 'maintain' should be construed in the sense of 'improve'; that is, the making of local improvements by special taxation or special assessments for park purposes, since to give the word 'maintain' its strict meaning would render that clause of the statute meaningless, there being at the time the act was passed no law in the state authorizing the corporate authorities of townships to levcy special taxes or special assessments to maintain public parks. People v. Ennis, 50 N. E. 236, 237, 118 Ill. 530."

51. Most directly applicable to the condition of the Plaintiff is the decision of the Supreme Court of Idaho in the case of Colburn v. Wilson, 24 Idaho 104, 132 Pac. 579, which is the leading case in Idaho in regard to operation and maintenance charges in irrigation districts. A careful reading of the decision of the Idaho Court in this case reveals the fact that the operation and maintenance charge which the directors of the irrigation district are authorized to apportion under Section 2407 of the Idaho Revised Codes ,which is the same as Section 4384 of the Idaho Compiled Statutes, may include charges for improvements as well as charges for upkeep and the charge involved in the case of

Colburn v. Wilson did include improvements and was sustained by the Supreme Court as lawful and proper, is shown by the following quotations from that case:

> "The board of directors of the district levied the annual tax on the lands of the district to cover the necessary expenses for maintaining, operating, repairing and *improving* the property and works of the district for the current year. At such meeting and for such necessary expense the board of directors made a levy extending over all the lands of the district amounting to the sum of $113,600, which sum was spread equally and not otherwise, to-wit: at the rate of $5.00 per acre over and upon all the lands of the district."
>
> "We are of the opinion that Section 2407 is clear and explicit and specially confers jurisdiction on the board to act upon its own judgment and levy an assessment upon all the lands of the district for expenses in maintaining and operating the property of the district, and that such assessment shall be spread upon the lands of the district and shall be proportionate to the benefits received by such lands, growing out of the maintenance and operation of the works of said district. Such jurisdiction having been conferred by the Legislature upon the board in this instance, and the board, having determined and allowed the expenses of *improving* and maintaining the system during the year the assessment is made, and having jurisdiction to make the assessment upon all the lands of the district, should spread the same upon all the lands of the district, and such assessments shall be proportionate to the benefits received by such lands, growing out

of the maintenance and operation of said works of said district according to the judgment and discretion of said board, and no claim being made of any fraud, the determination of the board must be accepted as conclusive.

Shuttuck v. Smith, 6 N. D. 56, 69. N. W. 5."

Colburn v. Wilson, 24 Idaho 104, 132 Pac. 579.

52. There is no sharp distinction between construction expense and operation and maintenance expense. In the leading case under the Reclamation Law, the case of Swigart v. Baker, 229 U. S. 187 (57 L. Ed. 1134) the Supreme Court, in giving effect to the intent of Congress, held that although the statute made no reference to the collection of operation and maintenance as such, the provisions of the statute authorizing the collection of the cost of cnstruction included authority to collect operation and maintenance also. In other words, that operation and maintenance is a part of the cost of construction and that it is within the discretion of the Secretary of the Interior to divid the cost of construction, including operation and maintenance, into two parts and designate one of them the "building charge" and the other the "operation and maintenance charge." That is what was done in the case before the Supreme Court in Swigart v. Baker, and was the practice under the original Reclamation Act even before the Extension

Act specifically authorized an operation and maintenance charge.

> "The Sunnyside Unit of the Yakima Irrigation Project was *so far completed* in 1909 that the Secretary of the Interior gave notice that water would be furnished for irrigation purposes, and that 'the charges would be in two parts: 1. Building of the irrigation system, $52 per acre. * * * 2. For operation and maintenance, 95 cents per acre per annum.' The appellee, Baker, applied for a water right and paid the assessed charges until 1911, when he refused to pay the 95 cents per acre for maintenance and operation on the ground that the secretary had no authority to make such an assessment."
>
> "In pursuance of this act, various works, including that of the Sunnyside Unit of the Yakima Project, were constructed and notice was given of the charges that would be made. At first they were stated in a lump sum, cost of building, maintenance, and operation making up the total. After 1906, the charges were separately stated substantially thus: '1. For building, $....per acre; 2. For maintenance and operation, $.... per acre per annum.' "
>
> "The contention that this last item could not be assessed against the irrigated land is based upon the fact that Sec. 4 authorizes the secretary to make the estimated charges 'with a view of repaying the cost of construction of the project.' But an analysis of the act shows that the charges were not limited to the building of the dam or the digging of the canals, but included the purchase of land needed for

reservoirs and everything chargeable to 'the cost of construction of the project,' which project was later to be turned over as a going concern to the landowners."

"The statute provides that the cost of construction of the project shall be charged against the land within the irrigable limits. The phrase is not expressly defined, and being general in its terms, is not necessarily limited to building, but may include the preservation and maintenance of what has been built. For example, a statute authorizing the levy of a tax to construct a sewer was held to empower the city to levy taxes for its maintenance. Power to construct a dock imposed the duty of operating it. Permission to 'construct internal improvements' warranted the purchase of a plant already built, and authority to construct a road conferred power to maintain it. Re Fowler, 53 N. Y. 60; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; Atty. Gen. v. Boston, 142, Mass. 200, 7 N. E. 722; Pelham v. The B. F. Woolsey, 16 Fed. 418; Atchison, T. & S. F. R. R. Co. v. McConnell, 25 Kan. 372; Bell v. Maish, 137 Ind. 226, 36 N. E. 358, 1118; Weston v. Hancock County, 98 Miss. 800, 54 So. 307. So, in the present case the statute provides that the secretary may assess 'the cost of construction of the project' without defining the term, and it may assist in arriving at the legislative intent to refer briefly to the facts leading up to the passage of the reclamation act."

Swigart v. Baker, 229 U. S. 187, 57 L. Ed. 1134.

53. However, we do not rest our case on any principle on which there is any division of opinion

among the courts, but revert to the admitted fact that the seepage which makes necessary the drainage expense involved in this case is according to the plaintiff's own allegations the direct result of the operation of the project, and the project works. The drainage work involved in this case is necessary as a means of making restitution for the damage done by the operation of the project. It is a form of reparation in kind in lieu of payment of damages in cash.

54. When land has been destroyed by seepage resulting from the operation of an irrigation system, there are two ways in which the landowner may be compensated for the damage which has been done. He may be paid the value of the land in cash, or a system of drains may be provided to remo the surplus water and restore the land to its former value and usefulness. It can not be argued that any different legal principle is involved if reparation is made in kind rather than in cash, and if this form of reparation is the cheaper plan and also accomplishes the purpose of checking the spread of seepage to other lands and makes it possible for the canal owners to continue the operation of their canal system in the future without destroying the property of others, surely that would be no objection.

55. It occurs to us that the question really involved in the case at bar is the question:

"Is the expense of compensation either in cash or in kind, for the damage resulting from the operation of an irrigation project, or any other kind of a project, an operating expense?"

Here we find the courts entirely unanimous in holding that such an expense is always an "operating expense".

"The operating expenses of a railroad company should be construed to include a claim for damage done to property by the railroad company in negligently running a train at a highway crossing. Smith v. Eastern R. Co., 124 Mass. 154, 155."

"Liabilities incurred by the receiver of a railroad for car rentals, for cars destroyed by fire, for rolling stock, equipment and traffic balances due other roads, and for damages for injuries to persons or property caused by torts of the servants of the receiver are legally classed as items of "operating expenses'. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Tex.) 126 S. W. 296, 300."

To the same effect are:

Green v. Railway Co., 97 Ga. 15, 24 S. E. 814, 33 L. R. A. 806.

24 Am. & Eng. Ency. Law, page 31.

Anderson v. Condict, 93 Fed. 349, 35 C. C. A. 335.

Railway Co. v. Railway Co., 93 Fed. 543, C. C. A. 423.

"They subjected their securities to the expense of operation,—the trustee, by its affirmative act in praying the court to take possession and operate the railway; the holders of the certificates, by the provision of the order authorizing the issuance of the certificates, and which was expressed upon their face, making them subject to the payment of operating expenses and the cost of administration. For that purpose, and to that extent, these parties were vicariously in the possession and operation of the railway through the court as their representative. All liabilities of the receiver were imposed upon the corpus of the property, failing income, as certainly as a mortgagee would be personally liable if he possessed and operated the railway. Technically, perhaps, payment for personal injury cannot correctly be denominated cost of operation; but it is an expense incurred in and by reason of the operation, and as such should be allowed in the accounts of the receiver. Klein v. Jewett, 26 N. J. Eq. 474."

Anderson v. Condict, 93 Fed 349, 35 C. C. A. 335.

"Damages for personal injuries caused by the negligence of employes are incidental to the operation of every railroad, and may properly be classed as a part of the operating expenses, whether the road is operated by a corporation or a receiver."

South Carolina & G. R. Co. v. Carolina C. G. & C. Ry Co., 93 Fed. 543, 35 C. C. A. 423.

56. Surely it will not be held that the Secretary of the Interior may remedy the damage done

by the operation of a Reclamation Project by paying damages in cash and charging the same as a part of the annual operation and maintenance charge, but cannot adopt the cheaper and better plan of providing drainage which will, at less expense, remedy the damage and at the same time furnish protection against future damage of a similar nature so that the operation of the project may be continued hereafter without destroying the property of others.

57. The various Reclamation Laws all give the Secretary of the Interior wide discretion in determining and announcing both the construction charges and the operation and maintenace charges on the various reclamation projects and we think must be held to vest the Secretary of the Interior with the necessary authority to decide debatable questions as to whether certain items of expense in a given case are more properly an operation expnse or a construction expense, and that such decision when made without fraud will not be reviewed by the Court even if it were a case in which the Court in the absence of a decision by the Secretary of the Interior, might have reached a different conclusion. The principle involved in such cases has been clearly stated and the authorities compiled and reviewed by the Supreme Court of the United States in the very recent case of Houston v. St. Louis Independent Packing Co., 249 U. S. 479, 63 L. Ed. 717:

"Whether or not the term 'sausage', when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive, is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act, and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairy arrived at with substantial evidence to support it."

"This rule has been most frequently applied in land department cases, but often also to decisions by heads of other departments."

"Thus, to the action of the Secretary of the Navy in Decatur v. Paulding, 14 Pet. 497, 10 L. Ed. 559; to the action of the Secretary of the Interior, on full consideration of the subject, in Gaines v. Thompson, 7 Wall 347, 19 L. Ed. 62, and in Burfenning v. Chicago, St. P. M. & C. R. Co., 163 U. S. 321, 41 L. Ed. 175, 16 Sup. Ct. Rep. 1018; and to decisions of the Postmaster General in Bates & G. Co. v. Payne, 194 U. S. 106, 48 L. Ed. 894, 24 Sup. Ct. Rep. 595, and Smith v. Hitchcock, 226 U. S. 53, 57 L. Ed. 119, 33 Sup. Ct. Rep. 6. The doctrine has been extended by Act of Congress to decisions by the Secretary of Commerce and Labor. TangTun v. Edsell, 223 U. S. 673, 56 L. Ed. 606, 32 Sup. Ct. Rep. 359; Zakonaite v. Wolf, 226 U. S. 272, 57 L. Ed. 218, 33 Sup. Ct. Rep. 31; Lewis v. Frick, 233 U. S. 291, 58 L. Ed. 967, 34 Sup. Ct. Rep. 488."

"The scope of the rule is illustrated by this Court, saying in Johnson v. Drew, 171 U. S.

93, 99, 43 L. Ed. 88, 90, 18 Sup. Ct. Rep. 800:

"'If there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this Court, it is that the decision of the land department upon mere questions of fact, is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts'."

"In New Orleans v. Paine, 147 U. S. 261, 264, 37 L. Ed. 162, 163, 13 Sup. Ct. Rep. 303:

"'In Noble v. Union River Logging R. Co., 147 U. S. 165, 37 L. Ed. 123, 13 Sup. Ct. Rep. 271, we had occasion to examine the question as to when a court was authorized to interfere by injunction, with the action of the head of a department, and came to the conclusion that it was only where, in any view of the facts that could be taken, such act was beyond the scope of his authority. If he were engaged in the performance of a duty which involved theexercise of discretion or judgment, he was entitled to protection from any interference by the judicial power'."

Houston v. St. Louis Independent Packing Co., 249 U. S. 479, 63 L. Ed. 717.

58. It may be argued by the Appellant that the question here involved is not a question of fact, but we think that it must be held that the question finally decided by the Secretary of the Interior, and necessary to be decided by him, is the question, how much money is it necessary to expend to properly operate and maintain the Boise Project without destroying the property of others, and the

companion question of what charge per acre is necessary to raise the required sum—which certainly are questions of fact. At any rate, the decision that the amount specified in paragraph (b) of the Public Notice of February 15, 1921, is necessary or proper to pay operating expenses, is at least as much a question of fact as is the question whether the term "sausage" is a misnomer for the compound involved in the case of Houston v. St. Louis Independent Packing Co.

59. The Circuit Court of Appeals for the Eighth Circuit said with reference to drainage on Federal Reclamation Projects:

> "The necessity for drainage and the methods of conducting the work are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the courts."
>
> United States v. Ide, 277 Fed. 382.

60. The District Court for the Idaho District said in the case of Payette-Boise Water Users' Association v. J. B. Bond:

> "Seepage is one of the natural incidents of operating the system and it would seem to be plain that the necessary expense of providing drainage to prevent damage therefrom is quite as naturally to be covered by revenues collected for operation and maintenance as any other expense to prevent damage from operation."

Payette-Boise Water Users' Association v. Bond, 269 Fed. 169.

61. The decision of the District Court in the Payette-Boise Water Users' Association case, from which the above paragraph is quoted, part of which is reported in 263 Fed. 734 and part in 269 Fed. 159, has been overruled in part by later decisions of this Court, so that it is necessary to consider how far, if at all, the particular question here involved has been affected by the decisions of this Court. The basis of the decision of the District Court in the Payette-Boise Water Users' Association case is shown by the following quotations:

> "The first and most sweeping contention of the plaintiff is that upon July 2, 1917, the Secretary was wholly without power to establish rates, for the reason that the time had passed for taking such action, and further that the authority conferred by law, especially by Section 4, above quoted, had been once exercised and was functus officio. It urges that under this section the cost is to be estimated and public notice of the apportionment thereof given before the construction of the works and settlement upon the land, and not after, and that it is the 'estimated' rather than the 'actual' cost which is to be returned to the reclamation fund."
>
> "Generally speaking, it is thought that plaintiff's construction of Section 4 of the act is correct."
>
> "In short, from all the evidence I find that the understanding, in substance, was that the

provision of the act requiring the estimate to be made before commencing construction work and before settlement would be waived, and that the settlers would pay the actual cost when and after that should be determined, instead of the estimated cost to be determined by the Secretary in advance."

"Obviously, if as we have found, both parties acted upon the understanding that the obligation of the settlers would be to reimburse the government for its actual outlay, the Secretary is now without discretion touching that matter."

"Under their agreement, the power to declare the actual cost of the project was committed to neither party, and, in the case of a controversy, the question, like other questions of fact affecting the relative property rights of contending parties, is for judicial investigation and determination."

Payette-Boise Water Users' Association v. Cole, 263 Fed. 734.

62. The case of Yuma County Water Users' Association v. Schlecht involves the construction of the same statute and the same form of contract involved in the Payette-Boise case, except that in the Yuma case the contract provided that payment should begin after completion of the project, while in the Boise case the contract provided for payments, the first of which "shall be payable when the water is first delivered from said works."

63. The decision of this Court in the Yuma case is as follows:

"Section 4 of the Reclamation Act gives authority to the Secretary of the Interior, after determining that an irrigation project is practicable, to cause to be let contracts for the construction work in such portions or section as it may be practicable to construct and complete as parts of the whole project, provided funds are available in the reclamation fund, and thereupon to give public notice of the lands irrigable under the project, of the charges which shall be made per acre upon entries, and upon lands in private ownership capable of being irrigated and the number of annual installments in which the charges shall be paid. The section continues:

" 'The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of * * * the project, and shall be apportioned equitably: Provided,' etc.

"The notice given was in clear accord with the statute, and presumably was based upon data and information then at hand. By estimated cost is not meant the actual exact final sums paid for construction, but rather such sums as it is believed after careful computations will cover the expenses and outlay directly and fairly connected with the construction of the project. The statute contemplates that contracts shall be let prior to the giving of the public notice, and the obvious reason for this is to give to the Secretary of the Interior an adequate knowledge upon which to make an estimate."

"Correspondence such as there was in the present case between the secretary and oicials of the Reclamation Service, wherein estimates are considered and discussed in laying out the work prior to the date of the contract between the landowners and the United States, cannot

be regarded as a public notice, nor as in any way binding upon the government. Utah Light & Power Co. v. United States, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. Ed. 791. As the whole theory of the statute is that there shall be a return to the reclamation fund of the estimated cost of constructing the project, manifestly the United States should not be found by letters or statements published antecedent to plain agreements made pursuant to the statute. It is unfortunate, that in the Yuma project there was a substantial and material difference between preliminary enginering estimates and the estimate which was made at a later time; but in the absence of some substantial showing that the action of the secretary was fraudulent or arbitrary or so erroneous as to justify an inference of illegality or wrongdoing, it is not within the province of the courts to interfere. Noble v. Union R. Logging Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123; Swigart v. Baker, 229 U. S. 187, Sup. Ct. 645, 57 L. Ed. 1143; N. Y. Canal Co. v. Bond (C. C. A.) 265 Fed. 228."

"Moreover, the contract between the United States by the Secretary of the Interior and the Water Users' Association provides that the association will promptly collect or require payment for that part of the cost of the works which shall be apportioned by the secretary to its shareholders; also that payments for the water rights would be made and enforced by proper means. The fact, therefore, that the cost is greater than was expected cannot be urged now as a ground for equitable relief. Hihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106."

Yuma County Water Users' Association v. Schlecht, 275 Fed. 885.

64. In the case of Twin Falls Salmon River Land & Water Company v. Caldwell, reported in 272 Fed. 356, this Court held that the decision of the Secretary of the Interior which is implied from his action in authorizing patent for 35,000 acres is that the water supply from the available system is ample for the irrigation of that acreage and that on this question, which covers both the question of the number of acres which may be properly irrigated from the reservoir in question and the duty of water for such lands, the decision of the Secretary of the Interior is conclusive and not subject to review by the Court.

> "A stipulation just filed by the parties to this appeal sets forth that a patent has now been issued and delivered by the United States to the State of Idaho for approximately 35,000 acres of land in this project. This action on the part of the federal government establishes the fact that the Secretary of the Interior has determined in effect that an ample supply of water has been provided for the irrigation of 35,000 acres of irrigable land within the project. We must accept that finding as conclusive."
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> Twin Falls Salmon River Land & Water Co. v. Caldwell, 272 Fed. 365.

65. In the case of Yuma County Water Users' Association v. Schlecht, this Court cites in support of the decision quoted above, the previous decision of this Court in the case of New York Canal Co.

v. Bond, 265 Fed. 228. The New York Canal Co. case involves the question of the proper operation and maintenance charge to be assessed against the shareholders of the New York Canal Co., under a certain contract between the company and the United States. The statute involved in determining that charge is the same statute covering the question of the operation and maintenance charge to be assessed against the landowners of the Nampa & Meridian Irrigation District, and while there is some difference in the wording of the contract, there is sufficient similarity to make the decision very much in point in the present controversy. In that case the Court reviewed the statute and the contract as follows:

> "In order, however, to obtain a better understanding of the controversy, reference should be had to Section 5 of the Act of Congress of August 13, 1914, 38 Stat. 686 (Comp. St. Sec. 4731e), which provides that, in addition to the construction charge, every water right applicant or land owner upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the project or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered, provided that, when an organized association shall so request, the Secretary of the Interior is authorized in his discretion to transfer the operation and maintenance of all or any part of the project works,

subject to such rules and regulations as he may prescribe. Keeping these several matters in mind, and going back now to Section 16, we find its provisions quite plain. In addition to the charge to be paid by the contract, the company agreed to pay an annual operation and maintenance charge, to be determined and announced by the Secretary of the Interior as provided in Section 5 of the Reclamation Act of August 13, 1914, just referred to. There is also in the contract provision for the irrigation season of 1918 and each year thereafter until further notice, whereby the operation and maintenance charge would be 40 cents per acre-foot for all water delivered to the land described in a certain order after July 1st of each year; also a provision that for 1918 and each year thereafter until further notice by the Secretary of the Interior there should be a minimum operation and maintenance charge of 40 cents per acre for water service after July 1st for each and every irrigable acre in the tract described, whether water was used or not; also provision that if the company paid to the United States, on or before the date when the charge was due, the operation and maintenance charge for the supplemental water supply provided for in the contract, the payments would be subject to a discount as provided by the referred to Act of Congress of August 13, 1914, and if not paid when due penalties might be imposed as provided in Section 6 of that act (Comp. St. Sec. 4731f), and that the—

'said operation and maintenance charge after July 1st of each year shall cover all water delivered after July 1st out of both supplemental and vested water rights'."

New York Canal Co. v. Bond, 265 Fed, 228.

66. In both cases the contract leaves the matter of determining the rate to the Secretary of the Interior, but subject in the New York Canal Co. case to the agreemnt that for the first year the rate should be forty (40c) Cents per acre-foot and subject in the Nampa & Meridian Irrigation District case to the agreement that the rate to be determined by the Secretary of the Interior shall be the same rate determined by the Secretary of the Interior as the operation and maintenance charge for the project lands outside of the district.

67. After reviewing the statute and contract this Court held in the New York Canal Co. case that had the parties not agreed on the forty (40c) cent rate for the year 1918, it would have been the duty of the Secretary of the Interior in his judgment to fix a rate to be charged to the shareholders of the company, and "it is reasonable to say that under the Reclamation Extension Act of August 13, 1914, authority is placed in the Secretary of the Interior to fix charges where the parties have not agreed upon them."

> "Reference to the offer contained in the public notice of the Secretary of the Interior is not required, in view of the fact that the parties agreed upon a rate of 40 cents per acre-foot as the maintenance rate in 1918 for all

water delivered after July 1st. *Had they not agreed to that rate, it would have been the duty of the Secretary of the Interior in his judgment to fix a rate to be charged to the shareholders of the company.* Indeed, under Section 8 of the contract of 1906, as well as Section 16 of the contract of July 1, 1918, the parties agreed that the Secretary of the Interior should determine the charges to be made, and it is reasonable to say that under the Reclacation Extension Act of August 13, 1914, authority is placed in the Secretary of the Interior to fix charges where the parties have not agreed upon thm. Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106; Houston v. St. Louis Independent Packing Co., 249 U. S. 479, 39 Sup. Ct. 332, 63 L. Ed. 717."

New York Canal Co. v. Bond. 265 Fed. 228.

68. The conclusion to be drawn from the decisions of this Court i nthe Yuma case, the New York Canal Co. case and the Twin Falls Salmon River Land & Water Co. case, is that the determination of the charges to be made, both as to construction charges and as to operation and maintenance charges, is a matter for the judgment and discretion of the Secretary of the Interior and in the absence of fraud, not subject to review by the Court; that it is proper for the Secretary of the Interior to determine and announce such charges in his public notice, and that a public notice issued upon the completion of the project, as was done in the Yuma case, is in full compliance with the re-

quirements of the statute. What then is the application of this rule to the present controversy?

69. The case as now presented is one in which the Secretary of the Interior by issuing his public notice of February 15, 1912, attached to the Complaint as Exhibit "C", has exercised his judgment and discretion in favor of collecting this element of cost as an operation and maintenance charge. Therefore, in order to sustain the Motion to Dismiss it is only necessary to hold that it is within the discretion of the Secretary of the Interior to collect such cost as an operation and maintenance charge and is not necessary to go to the length to which the District Court went in the Payette-Boise Water Users' Association case in which it was virtually held that the Secretary of the Interior could not provide for future drainage in any other way except as an operation and maintenance charge. It appears to us that although the latter theory is not sustained by the decisions of this Court, the former theory that such action is within the discretion of the secretary, is sustained by the cases referred to above.

70. A part of Appellant's Brief (pages 19 and 20) is devoted to the question of construction by the parties, but the record does not disclose whether it has been the general practice of the Secretary of the Interior under the Reclamation Laws to provide for drainage expense as a construction charge,

or an operation and maintenance charge, and so far, at least, as concerns drainage which becomes necessary after public notice has been issued, it would appear that in most cases the drainage would have to be provided as an operation and maintenance charge if it were provided at all.

71. On this point the District Court said:

> "Finally it is suggested that until recently it has been customary with the Reclamation Service to carry drainage as a part of construction. I do not stop to inquire touching the correctness of the statement. The facts are not expressly pleaded, and if, so far as concerns this project, we go to the sources from which the facts are to be gotten, we find that at the time the drainage expenditures covered by the plaintiff's contract were made, the service also included in 'Construction' cost, what are admittedly expenses of operation and maintenance. That is to say, during the long period prior to the giving of formal public notice the partially completed system was operated, and in the course of such operation large expenses were incurred over and above the rentals and other income for the same period, and this balance was covered into and charged against construction cost; it follows that a like disposition of the drainage expenditure has little interpretive significance."
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> Opinion of District Court—page 88 of Transcript.

THE APPELLANT IS BOUND BY ITS CONTRACT TO ACCEPT THE DECISION OF THE SECRETARY OF THE INTERIOR.

72. We think that the authorities quoted above justify the conclusion that the secretary has authority under the law to provide necessary drainage to remedy the seepage condition which has resulted from the operation of the project, and to charge the cost of such drainage as an operation and maintenance charge.

73. But if it should be thought that in the absence of contract the secretary would not have such power, still the parties may agree to accept the decision of any designated officer or other person and when such person has rendered his decision acting in good faith and without fraud, such decision is final, and is binding upon the parties who have agreed to accept it, and is not subject to review by the Court.

74. The Appellant agreed in this case that the project lands in the District shall pay the same charge announced by the Secretary of the Interior for similar lands of the Boise Project.

75. THE RULE OF LAW APPLICABLE TO SUCH CONTRACTS HAS BEEN STATED BY THE SUPREME COURT MANY DIFFERENT TIMES IN A LONG LINE OF DECISIONS IN WHICH THERE IS NO CONFLICT.

The rule is stated in the case of United States v. Gleason, as follows:

> "The judgment of an engineer to whom a contract refers the determination of the question of performance can be revised by the Court only upon allegation and proof of bad faith, or of mistake or negligence so gross as to justify an inference of bad faith."

United States v. Gleason, 175 U. S. 688, 44 L. Ed 284.

Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106.

Merrill-Ruckgaber Co. v. U. S., 241, U. S. 387, 393, 60 L. Ed. 1058.

United States v. Barlow, 184 U. S. 123. 133, 46 L. Ed. 463.

Chicago S. Fe. & Cal. R. R. v. Price, 138 U. S. 185, 193, 34 L. Ed. 917.

Martinsburg & P. R. R. v. March, 114 U. S. 549, 550, 29 L. Ed. 255.

Sweeney .v United States, 109 U. S. 618 618, 620, 27, L. Ed. 1053.

76. In the case of Kihlberg v. United States the Court said:

> "The contract, which is the foundation of this action, provides that transportation shall be paid 'In all cases according to the distance from the place of departure to that of delivery.' But no specific rule is prescribed for the as-

certainment of distances. The contract is silent as to whether they shall be estimated by an air line, or by the route usually traveled by contractors in conveying government stores, or by the road over which troops ordinarily marched when going from one post or station to another. The parties, hwever, concurred in designating a particular person, the Chief Quartermaster of the District of New Mexico, with power not simply to ascertain but to fix the distances which should govern in the settlement of the contractor's accounts for transportation. The written order of General Easto nto the depot quartermaster at Fort Leavenworth was an exertion of that power. He discharged a duty imposed upon him by the mutual assent of the parties. The terms by which the power was conferred and the duty imposed are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the Chief Quartermaster, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part. The difference between his estimate of distances and the distances by air line, or by the road usually traveled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. His action cannot, therefor, be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Indeed, it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority in question. If

the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might have constantly arisen between the contractor and the government, resulting in vexatious and expensive and, to the contractor oftentimes, ruinous litigation. Hence the provision we have been considering. Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the Chief Quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment in the premises, his action in the premises is conclusive upon the appellant as well as upon the government. The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instiument."

Kihlberg v. United States, 7 Otto 398-403, 97 U. S. 398, 24 L. Ed. 1106.

77. In the case of Martinsburg & Potomac R. R. Co. v. March, the Court said:

"As, for this reason, the case must be remanded for a new trial, it is proper to say that, if the declaration had been good on demurrer, we should have been compelled to reverse the judgmnt for errors in the instructions given to the jury. Several instructions were asked by the defendant embodying the general proposition that the final estimate of the engineer was to be taken as conclusive, unless it appeared from the evidence that, in respect thereto, he is guilty of fraud or intentional mis-

conduct. Those instructions were modified by the court by adding after the words 'fraud or intentional misconduct' the words 'or gross mistake.' This modification was well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature as necessarily implied bad faith upon the part of the engineer. We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part."

Martinsburg & P. R. R. v. March, 114 U. S. 549, 550, 29 L. Ed. 255.

78. This also appears to have been the view of this Court in the case of Yuma Association v. Schlecht, where the Court said:

"Moreover, the contract between the United States by the Secretary of the Interior and the Watr Users' Association provides that the association will promptly collect or require pay-

ment for that part of the cost of the works which shall be apportioned by the secretary to its shareholders; also that payments for the water rights would be made and enforced by proper means. The fact, therefore, that the cost is greater than was expected cannot be urged now as a ground for equitable relief. Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106."

Yuma County Water Users' Association v. Schlecht, 275 Fed. 885.

and in the case of New York Canal Co. v. Bond, where the Court said:

"Reference to the offer contained in the public notice of the Secretary of the Interior is not required, in view of the fact that the parties agreed upon a rate of 40 cents per acre-foot as the maintenace rate in 1918 for all water delivered after July 1st. *Had they not agreed to that rate, it would have been the duty of the Secretary of the Interior in his judgment to fix a rate to be charged to the shareholders of the company.* Inded, under Section 8 of the contract of 1906, as well as Section 16 of the contract of July 1, 1918, the parties agreed that the Secretary of the Interior should determine the charges to be made, and it is reasonable to say that under the Reclamation Extension Act of August 13, 1914, authority is placed in the Secretary of the Interior to fix charges where the parties have not agreed upon them. Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106; Houston v. St. Louis Independent Packing Co., 249 U. S. 479, 39 Sup. Ct. 332, 63. L. Ed. 717."

New York Canal Co. v. Bond, 265 Fed. 228.

Respectfully submitted,
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